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MIDWIFERY AND STATE LAW DESK REFERENCE

by

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This reference contains summaries of reported cases involving midwifery and state law at the appellate level up until August 2003. This work is not to be cited as legal authority.

How to use this reference

The indexes in front list legal topics and states. The numbers after the topics in the index show which cases deal with that topic. The letters or numbers in parentheses denote which paragraph in that particular case summary you can find the issue. The case summaries are presented after the indexes, with each case assigned a number, 1-26.

For example: If the Subject Index reads:

"Acts constituting the practice of medicine: 1, 3a, 3f(1)1"

then you can find the topic, "acts constituting the practice of medicine" in case #1 and in case #3 at paragraphs a and f, subparagraph 1. Looking through the case summaries, case #1 is Banti v. State, and case #3 is Bowland v. Municipal Court.

The statutes and decisions reported in this work may not be current. I made all effort to include all reported cases involving midwifery and state law, but I did not shepardize or update the cases.

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CASE SUMMARIES

1. BANTI V. STATE, 289 S.W.2D 244 (TEX.CR.APP.1956)

Subjects: TX, Criminal. direct-entry midwife, unauthorized practice of medicine, sufficiency of evidence, midwifery defined.

Statutes:

#1: Art. 741(2), Vernons Ann. P.C.

Facts: A direct-entry midwife rendered her services for a $40.00 fee, admitted she had delivered thousands of babies, and diagnosed an eight-month-pregnant mother as "okay." A month later the midwife re-examined the mother, washed her with alcohol, changed her clothes and bed sheets, administered pituitrin, helped deliver the baby, cleaned the afterbirth, and tried to revive the stillborn baby by putting her in warm water. (The statute prohibited non-physicians from treating, or trying to cure, diseases, disorders, deformities, or injuries.)

A. The midwife could not be convicted under the medical practice act (#1) for practicing medicine without a license because:

(1) Texas did not define practicing medicine to include assisting women in parturition or childbirth

(2) the midwife's acts were not "treating for a disease, disorder, deformity, or injury, or to effect a cure"

(3) midwifery may have been outside the realm of the medical practice act

(4) the evidence was insufficient to show that the pregnant woman was treated for a "disease, disorder, deformity, or injury, or to effect a cure thereof." (Note: the statute did not include the phrase "treating a physical condition")

(5) the act (#1) did not specify midwifery as a punishable offense and, childbirth was a normal function, not a "disease, disorder, deformity, or injury."

B. Midwifery was the "practice of obstetrics."

2. **BOWDEN, STATE V., 55 SO.2D 764 (LA.1951)**

Subjects: LA, Crim/Admin. unauthorized practice of midwifery, interpretation of statute (crim)

Statutes:

#1: Act 56 of 1914, amended by Act 54 of 1918. LSA -RS 37:1261 et seq.

Facts: Two previously licensed midwives had not renewed their licenses under the midwifery licensing statute (#1.) The state convicted the midwives of unauthorized practice of midwifery. (The statute required midwives to be certified by the LSA Board of Medical Examiners to practice, and to renew their licenses annually by paying a fee.)

A. The criminal convictions were overruled because:

(1) although the midwives had not renewed their licenses, the board of examiners never took action to cancel the license/certificates from the record, which the statute stated the board must do after receiving notice from the Secretary-Treasurer that the fees were not paid

(2) the statute recited nothing about the cessation of privileges or rights under the original certificate upon failing to renew it. It only declared the statute violated where one practiced but had *never* recorded a license. (emphasis added)

3. BOWLAND V. MUN CT. FOR SANTA CRUZ CITY, 134 CAL. RPTR. 630 (CAL SUP. CT. 1976), 566 P.2D 1081 (CA. 1976)

Subjects: CA, Crim. direct-entry midwife, unauthorized practice of medicine, constitutionality of statute (privacy, vague, overbroad), extraordinary relief (writ of mandate), no cause of action, exemptions (religious, family remedy, emergency, family member), midwifery defined.

Statutes:

#1: Bus. & Prof. Code secs. 2140. 2141, 2137

Facts: Two women who lacked midwifery certificates, but who held themselves out as "competent midwives" and assisted women in childbirth, were charged with unauthorized practice of medicine. (The statute proscribed diagnosing and treating "physical conditions.")

B. The midwives were denied a writ of mandate to restrain the municipal court from prosecuting (on grounds that the state's complaint stated no cause of action) because:

(1) although pregnancy was not a sickness or affliction under the statute, pregnancy was a "physical condition;" thus treating it was midwifery, which required a license to practice

(2) The prosecution's complaint stated a cause of action because it referenced both sections 2137 and 2140, and because the words "treated for a physical condition" in the complaint sufficiently warned the midwives that they were charged under both proscriptions of sec. 2141.

C. The statute regulating midwifery was not overbroad because, though its phrase "other mental or physical condition" was admittedly broad, its phrase, "diagnoses, treats, operates for, and prescribes," encompassed the conduct the midwives engaged in (claiming expertise)

D. The statute regulating midwifery was not vague because "other mental or physical condition" and "diagnoses, treats, operates for, and proscribes" narrowed its meaning to include someone practicing midwifery without a license, even if it unfairly proscribed other marginal offenses.

E. The statute did not violate the mother's privacy because:

(1) the right to privacy did not include the right to choose the manner and circumstances under which one bore a child

(2) childbirth occurred after the second trimester of pregnancy, when the child's interest superceded the woman's privacy right.

F. The statute for licensed midwifery (sec 2140) and the certificate to practice midwifery:

(1) authorized midwives to attend cases of normal childbirth, but excluded using an instrument at childbirth, assisting childbirth by artificial, forcible, or mechanical means, performing a version, administering, proscribing, advising, or employing any drug except disinfectant or cathartic

(2) the duty of any person assisting a childbirth to treat the newborn's eyes would not authorize that person to perform other midwifery acts

(3) midwifery and giving birth advice was not an emergency, family remedy, religious, or family member exemption because the midwives' main infraction was asserting to have expertise.

G. Midwifery was the furthering or undertaking to assist a woman in childbirth.

4. COMMONWEALTH V. PORN, 82 N.E. 31 (MASS.1907)

Subjects: MA, Crim. nurse-midwife, unconstitutionality of statute, unauthorized practice of medicine, midwifery defined

Statutes:

#1: Rev. Laws, C. 76 Sec. 8

(The statute prohibited unlicensed practice of midwifery by the use of instruments or any attempt to practice medicine "in any of its branches.")

Facts: Actions of a nurse-midwife, including using printed prescriptions to alleviate suffering and using obstetrical instruments in emergencies only when no doctor could be summoned was the unlawful practice of medicine--though childbirth was not a disease but normal function--because:

A. Midwifery was defined as:

(1) the practice of obstetrics

(2) in addition to assisting with normal births, using obstetrical instruments and prescribing formulas was the "practice of medicine in one of its branches."

B. The statute (#1) was not unconstitutional because:

(1) keeping a high standard of qualifications for physicians was a vital public health concern

(2) the statute's prohibitions were not unreasonable

C. Because the parties agreed on the facts, the question of whether the nurse violated the statute was a matter of law for the court to decide, not a factual issue requiring expert opinion about the statute's language.

4.5 DEHAY V. STATE 254 S.W.2D 513 (TEX.APP.1953)

Subjects: TX, Crim. non-physician (doctor of naturopathy), unlawful practice of medicine, evidence

Statutes:

#1: Arts. 739, 741, Vernon's P.C.

Facts: A doctor of naturopathy gave a pregnant woman a physical exam, a blood exam, a blood pressure check, a shot with a hypodermic needle, prescribed a diet, severed a newborn's umbilical cord, "cleaned the baby up", and charged $50.00. The non-physician also had an office and held himself out as a practitioner of medicine. The trial court convicted the non-physician of unauthorized practice of medicine for treating or offering to treat a person for a disorder without first registering his license with the office of the district clerk. The non-physician argued that the State had not proved that he had not registered his license, that the records themselves should have been introduced into evidence, and that the trial court wrongfully excluded evidence showing him to be a doctor of naturopathy, and that the State did not prove that he resided in the city where he was convicted.

A. The State proved that the non-physician had not registered his license because a deputy district clerk testified that he had searched and examined the records from the past forty-two years and found no license registered in the non-physician's name.

B. The records themselves did not need to be admitted into evidence because proving no recordation of the license filing was trying to disprove a negative.

C. The court did not wrongfully exclude evidence of the non-physician's license to practice naturopathy because a license to practice naturopathy by law did not authorize the practice of medicine.

D. The State proved that the non-physician resided in the city where he was tried through a telephone company supervisor who testified about the non-physician's local telephone numbers and through the victim/witness who testified that she had utilized the non-physician for medical treatment for her pregnancy at the non-physician's office. This evidence sufficed in the face of no evidence being submitted to the contrary.

5. DICKERSON V. STUART, 877 F. SUPP 1556 (M.D./FLA. 1995)

Subjects: Fed/MD/FLA, Civil, direct-entry midwife, extraordinary relief (injunction), unauth practice of midwifery, constitutionality of statute (freedom of speech, religion, vagueness, overbroad)

Statutes:

#1: Fla.Stat.Ann. Sect. 467.001 et *seq*. (West 1991 & Supp.1995) (Midwifery Practice Act)
#2: U.S. Const. amend. I

Facts: A direct-entry midwife who, following her religion, prayed for, encouraged, and assisted parents in home birth before, during, and after pregnancies, and gave expectant parents information about home birth, instructed father on birthing, touched infants only during emergencies, but did not hold herself out as a midwife, was being investigated for alleged violations of the Midwifery Practice Act (#1). (The statute required a license to practice midwifery, and prohibited an unlicensed person from advising on the progress of labor and childbirth, and rendering care to a pregnant woman.) The midwife sought an order to enjoin the Department of Business and Professional Regulation from enforcing Florida's Midwifery Practice Act against her. The midwife alleged that the Practice Act was unconstitutional by intruding on her freedom of religion, being vague by not defining "advising" and "rendering," violated free speech by forcing individuals to obtain a license to speak about midwifery (improper prior restraint), and was overbroad by prohibiting all unlicensed speech regarding the progress of childbirth and counseling, and prohibiting all care to mothers by an unlicensed person--including advising them about biblical alternatives. The Department moved to dismiss on grounds that the midwife's complaint stated no claim. The trial court granted the dismissal.

A. The midwife's complaint did not state a claim for violation of her constitutional rights because the midwife did not show a substantial burden on her religious freedom, even accepting that her religion favored home births, because the Midwifery Practice Act (#1) prohibited only an unlicensed person from supervising and advising on the progress of normal labor and childbirth, and for rendering care to a pregnant mother. The statute did not prohibit the midwife from sharing her *belief* that people should have home births.

B. The statute did not violate the midwife's freedom of religion because:

(1) the midwife did not allege that to get a midwife license she would need to perform acts forbidden by her religion (impermissible prior restraint); still,
(2) Florida's compelling interest in the health of mothers and children and ensuring midwife competency would take priority, thus demonstrating a need to regulate the field

(3) the midwife did not offer to show a less intrusive means of furthering that compelling state interest, and how those means would alleviate the burden on exercising her faith.

C. The statute did not violate the midwife's right to free speech, but was an acceptable regulation of speech because:

(1) the licensing scheme presented no danger of a censorship system resulting from "unbridled discretion" by the licensing authority to grant or deny licenses based on a religious or other belief. The Act did not compare with film and newspaper free speech cases

(2) the statute was narrowly drawn to achieve the compelling state interest in protecting the health of mothers and children

(3) the statute restricted speech only where speech was *advice* from an unlicensed person about the *progress* of childbirth.

D. Florida Midwifery Practice Act (#1) was not overbroad because:

(2) "progress" and "advice" had proper, understood dictionary meanings

(3) the statute did not encompass speech outside advising on the health of the mother and baby

(4) "normal labor" and "childbirth" did not prohibit persons from counseling others about whether to have children or to consider "biblical" alternatives to childbirth. It prohibited only giving advice on the "progress of childbirth"

(5) "Rendering pre-natal care" regulated only the practice of giving care to the mother.

E. The Florida Midwifery Practice Act (#1) was not unconstitutionally vague because

(1) it clearly defined "midwifery" and "childbirth"

(2) clearly prohibited only speech from unlicensed persons making a practice of advising parents about the progress of childbirth

(3) the statute was otherwise clear about what it prohibited.

5.5. FIRMAN V. STATE BOARD OF MEDICINE. 697 A.2D 291 (PA.CMWLTH. 1977)

Subjects: PA, Admin. nurse-midwife, unprofessional conduct, standard of review, interpretation of statutes, constitutionality of statute (due process--procedural), waiver of appellate review,

American disabilities act

Statutes:

#1 Medical Practice Act: 63 P.S. sect 422.40(b)
#2 Judicial Code, 42 Pa.C.S. Sect. 763
#3 Administrative Agency Law, 2 Pa.C.S. Sect. 704
#4 Title II of Americans with Disabilities Act (ADA), 42 U.S.C. sects 12101-12213 (1990) Supp. II
#5 28 C.F.R. Sect. 35.131
#6 Art VI, Clause 2 of U.S. Const. ("Supremacy clause")
#7 Medical Practice Act, 63 P.S. Sect. 422.38

Facts: A registered nurse-midwife in Pennsylvania was dependent on prescription drugs used for migraines. In 1995, the midwife forged a prescription of the drug for herself in Maryland. In 1996, she pled guilty to obtaining a controlled substance by fraud and for possessing the substance. The State Board of Nursing in Pennsylvania issued a Notice and Order of Automatic Suspension of the midwife's nurse-midwife license under the Medical Practice Act (#1). The statute mandated automatic suspension of a license issued under the Medical Practice Act of Pennsylvania if convicted of an offense in another jurisdiction if that offense would be a felony in Pennsylvania. The midwife appealed the suspension on grounds that: (1) the suspension violated Title II of the ADA (#4) and federal regulations (#5) by discriminating against past drug users and (2) the Medical Practice Act (#1) violated the Supremacy clause of the US constitution (#6).

A. The Medical Practice Act (#1) did not discriminate against drug-using nurse midwife because:

(1) Title II of the ADA (#4) prohibited discriminating on the basis of "status" i.e. drug addictions, while the Medical Practice Act addressed only a licensee's "conduct" in the form of felony violations

(2) "Conduct" and "status" were conceptually distinct. *Misconduct* was a basis on which the Board may have made a decision, even if the misconduct was related to a drug addiction.

B. The Medical Practice Act's (#1) automatic suspension provision did not violate procedural due process because:

(1) The midwife received an appropriate hearing because the constitutional minimum of the licensee having access to material upon which the charges were based, and the opportunity to respond was satisfied--in that:

(a) the midwife's protectible interest (her license) had little likelihood of being erroneously deprived

(b) the acts she committed in Maryland clearly would constitute felony violations of the Drug Act (#1) and the conviction was confirmed to the Pennsylvania court by certified copy, and, under the Act, the board could consider only whether the licensee committed a felony violation of the drug act or an analogous offense in another jurisdiction

(c) the midwife had answered to the charge in the Maryland court and admitted the facts alleged, which the Pennsylvania Boards reviewed before automatically suspending her license as the Medical Practice mandated

(d) the state interest served by using the summary procedure weighed mightily, and irreparable harm could result from imposing additional predetermination procedural safeguards in the Medical Practice Act

(2) the Hearing conducted by the Pennsylvania Board satisfied the due process requirement because:

(a) The midwife had a substantial property interest in that her license was a property interest, and depriving her of it would deprive her of the means to a livelihood

(b) The likelihood that the nurse midwife had been *erroneously deprived* of her property interest was negligible because the Medical Practice Act limited the Board to considering only whether the licensee did commit a felony violation of the Drug Act or analogous offense in another jurisdiction, and the Board reviewed the nurse midwife's Answer and record of the convictions in Maryland

(c) The state interest served by using such a procedure outweighed the burden of using a more rigorous procedure because the Board must act quickly when a medical practitioner threatens the health of the general public.

C. The standard of Review was limited to whether:

(1) the midwife's constitutional rights had been violated

(2) substantial evidence supported the factual findings

(3) whether errors of law were committed. (#3)

D. In interpreting whether the Medical Practice Act (#1) violated the ADA (#4), the review court did not need to resort to legislative history because the ADA's language was not too ambiguous to understand what the language meant.

E. The midwife waived her right to appellate review of whether the automatic suspension rule was inapplicable because her offenses in Maryland allegedly would not constitute felonies in Pennsylvania because the nurse midwife did not raise that issue in her "Statement of Questions" section of her appellate brief.

6. HILDY, PEOPLE V., 286 NW 819 (MICH. 1939)

Subjects: MI, Crim. direct-entry-midwife, unauthorized practice of medicine, interpretation of statutes (criminal)

Statutes:

#1: Comp. Laws 1929, Sects. 6737-6747;

A. A direct-entry midwife who performed only midwifery and who was qualified by education, training, and practical experience, did not commit unauthorized practice of medicine or violate the statute regulating the practice of medicine because the phrase in the statute (#1) "that all men and women who are not registered...and who wish to begin the practice of medicine, surgery, and midwifery in any of its branches...shall make application to the Board of Registration in Medicine...for a certificate of registration" applied only to persons wishing to practice medicine, surgery, and midwifery *inclusively*. The Act was silent as to examination and registration of those wishing to practice midwifery *only*, which was separate from the practice of medicine.

7. HUNTER V. STATE, 676 A.2D 968 (MD.APP.1966)

Subjects: MD, Crim. direct-entry midwife, constitutionality of statute (privacy), unauthorized practice of nursing, evidence, judge impartiality, waiver of appellate review.

Statutes:

#1) Md. Code of Health Occupations art., sect. 8-701(a)

(The statute required one be a registered nurse to practice midwifery)

Facts: Direct-entry midwife performed prenatal care for the mother and assisted in the home birth. She charged $1400.00. Complications arose and paramedics were called. The child died. An investigator arrived at the home and arrested the midwife. When the investigator told the midwife what the charges were, but before the investigator read the midwife her Miranda rights

(right to silence and to an attorney), the midwife stated, among other things, "I've delivered over a hundred babies....I have four women right now who are in my care and are about to deliver." The midwife was charged with practicing midwifery without a license.

A. A direct-entry midwife committed unauthorized practice of registered nursing because:

(1) the legislature never intended to leave lay midwifery unregulated

(2) the practice of midwifery required a license

(3) the term "nurse midwifery" in the statute (#1) included "traditional midwifery"

(4) the lay midwife's actions fell clearly within the scope of "practicing nurse midwifery."

B. The statute regulating the practice of midwifery (#1) neither presented a fundamental right issue nor violated a mother's right to privacy because:

(1) the statute (#1) did not prevent parents from using midwives or from giving birth at home

(2) the child's health and welfare were legitimate state interests and rationally related to the reason for the provisions regulating midwifery, that reason being to ensure that midwives were properly trained.

C. Lay midwife's statements that she had "delivered hundreds of babies" and had "other women presently in her care..." etc., before receiving Miranda warnings during her arrest were admissible evidence at trial because the statements were not responses to interrogation or products of coercion, inducement, or compelled self-incrimination, but voluntary blurts.

D. Midwife's failure to make a motion to recuse at the trial court waived the issue of trial judge bias for appellate review.

E. The judge, who decided the admissibility of testimony of a traditional midwife and of an investigator, both of whom had appeared before that judge in previous cases, did not act impartially because, though the judge had indicated that the investigator's reputation for credibility was good, the court's explanation on the ruling showed that he had based his determinations solely on evidence presented at the hearing.

8. JIHAN; PEOPLE V., 537 N.E.2D 751 (ILL. 1989)

Subjects: ILL, Crim. direct-entry midwife, constitutionality of statute (vagueness), standing

Statutes:

#1: Illinois Medical Practice Act, Ill.Rev.Sat. 1985, ch 111, Pgh. 4401 et seq., 4460, 4464;
#2: U.S.C.A. Const.Amend. 1
#3: *Id*. Amend 5, 14.

Facts: A direct-entry midwife, charged under the former medical practice act, told arresting officer she had monitored the baby's heartbeat, observed labor, internally examined the mother to determine dilation, and had an assistant at the birth.

A. The midwife did not have standing to argue that the Medical Practice Act prohibiting unlicensed practice of midwifery (#1) was vague as applied to other midwives on its face because:

(1) no first amendment issue was involved, but

(2) the midwife could make a vagueness challenge to the Medical Practice Act (#1) as applied to herself because it was her own conduct brought into question.

B. Medical Practice Act (#1), repealed December 31, 1987, was unconstitutionally vague to this midwife in this case because this case was:

(1) distinguishable from Bowland, Northrup, Smith, Southworth, where those states had defined more specifically what did not constitute midwifery

(2) this was a criminal proceeding where there was less tolerance (relative to civil proceeding) for statutory ambiguity because the consequences of imprecision were more severe

(3) in Ill, if a statute capable of creating or increasing a penalty or punishment could be constructed two ways, one must adopt that way favoring the accused. It was unclear whether "midwifery" broadly meant "assisting at childbirth", which evidence showed the midwife had done, or more narrowly meant physically "delivering" the child, which evidence did not show she had done. Thus the statute gave the midwife insufficient notice that her conduct was prohibited.

(4) (Note) The ruling had no effect on the statutory scheme of the new Medical Practice Act (#3)

9. JONES V. SOUTH DAKOTA BOARD OF NURSING AND SOUTH DAKOTA BOARD OF MEDICAL AND OSTEOPATHIC EXAMINERS, 1997 SD 78 (SD 1997)

Subjects: SD, Crim/Civil/Admin direct-entry midwife, unauthorized practice of midwifery,

extraordinary relief (injunction), evidence, jurisdiction, waiver of review.

Statutes:

#1: SDCL 36-9A-2, 13
#2: SDCL 36-9A-35

(The statutes required a nursing license to practice midwifery)

Facts: In 1992, a direct-entry midwife was enjoined from practicing midwifery without a license. In 1995, she was indicted under (#1) for practicing as a nurse-midwife without a license, but was acquitted. The South Dakota Board of Nursing and the Board of Medical Examiners then brought a contempt proceeding against her for violating the injunction. The trial court found the midwife in contempt of that injunction. The trial court suspended the 60-day jail sentence, but let the midwife file a five thousand dollar bond in case she violated the injunction again. The midwife filed a motion to reconsider. Denied. The midwife appealed, arguing that the criminal proceeding in 1995 precluded the later contempt proceeding, lack of subject matter jurisdiction, insufficient evidence, excessive bond, and that the statute (#1) was unconstitutional.

A. The midwife's prior acquittal of the charge of unauthorized practice of midwifery did not create double jeopardy when the Board initiated a contempt proceeding for her violation of an injunction resulting from a second alleged act of practicing midwifery with a different client because each act of midwifery was a separate violation.

B. The trial court had jurisdiction to hear the contempt matter because the Board's affidavit referencing the prior injunction and supplying copies of the injunction, order, findings of facts and conclusions of law, stipulation to facts, memorandum opinion, notice of entry of order of the injunction, certificate of service, certificate of live birth, and application for certificate of live birth, showed all the relevant facts necessary to establish the right and the charge.

C. A certificate of live birth listing the midwife as "other midwife," an application for the certificate, and the midwife's admissions of having practiced midwifery for years and attended the birth in question was substantial evidence to support the finding that her violation of an injunctive order not to practice midwifery was willful.

D. The midwife waived her right to appellate review of whether the bond condition on the injunction was excessive because she did not support her filed affidavit of indigence by arguing that point at trial.

E. The midwife waived her right to appellate review of whether the statutes violated her rights to privacy and equal protection because she did not argue that at trial.

10. KIMPEL, STATE V., 665 SO.2D 990 (ALA.CR.APP.1995); CERT. DEN.

Subjects: AL, Crim. direct-entry midwife, unauthorized practice of midwifery, pre-trial order (motion to dismiss), constitutionality of statute (vagueness, ambiguous, equal protection, privacy), jurisdiction, state appeal.

Statutes:

#1: Sec. 34-19-3, Code of Alabama 1975
#2: Sec. 12-22-91 Code of Alabama 1975
#3: Sec. 4515 Code of Alabama 1886

Facts: Direct-entry midwife was charged with practicing midwifery without a license. The midwife argued that the statute (#1) was unconstitutionally vague. The trial court dismissed the indictments. The state appealed.

A. The state, who had the case regarding practice of midwifery without license (a misdemeanor) dismissed in a pretrial order because the statute was found unconstitutional, could appeal to the criminal court of appeals rather than the Alabama Supreme Court because:

(1) The statute (#1) gave the State the right to appeal judgments holding statutes unconstitutional to the appellate court

(2) pretrial orders were final judgments

(3) the statute requiring constitutional rulings be appealed to the Supreme Court (#3) was passed before Alabama had a separate, lower appellate court.

B. The statute prohibiting the practice of nurse midwifery without a license (#1) was:

(1) not vague or ambiguous because its phrase "unlawful...to practice midwifery" combined with the definition of midwifery under 34-19-2(2) and 34-19-3, showed the need for midwives to have valid licenses, specifically that midwives needed to have permits. That gave adequate notice of what conduct (acting as a midwife without being licensed for it) was prohibited

(2) did not violate a mother's privacy because in the third trimester of pregnancy the governmental interest in protecting the mother and child superseded the mother's privacy right or alleged right to choose the manner of childbirth

(3) did not deny the mother equal protection because the practice of midwifery did not involve a

suspect class and the safety of the mother and child was a legitimate governmental concern.

11. LANGE-KESSLER V. DEPT. OF EDUC. OF THE STATE OF N.Y., 109 F.3D 137 (2ND CIR. 1997)

Subjects: FED/NY, Civil, direct-entry midwife, standing, constitutionality of statute (due process, privacy, right to follow chosen profession), summary judgment, standard of review, license requirements (physician recommendation)

Statutes:

(#1) U.S.C.A. Const.Amend. 5;
(#2) *Id*. 14;
(#3) Professional Midwifery Practice Act (PMPA); N.Y. McKinney's Education Law Sects. 6950-6958;
(#4) *Id*. 6952;
(#5) Id. 6951.1;
(#6) *Id*. 6955.2

Facts: Direct entry midwife and women who wanted to use direct entry midwife's services challenged the provision of the Midwifery Practice Act (PMPA) (#3) requiring a midwife to have a written practice agreement with a physician or hospital and a nurses degree, on grounds it violated the midwife's substantive due process and privacy rights. The trial court granted summary judgment against the midwife and clients. The midwife and the prospective clients appealed on grounds the summary judgment was improper and that the PMPA violated their substantive due process and privacy rights. The midwife asserted that the PMPA violated the fourteenth amendment (due process) by depriving her of the ability to earn a living in her profession by precluding direct-entry midwives. Prospective clients who wished to use her services in future pregnancies asserted that the PMPA violated their right to privacy by restricting their right to choose a birthing style and a qualified attendant of their choice.

A. The PMPA (#3) setting out the requirements for midwife licensure did:

(1) not violate the fourteenth amendment to the U.S. Constitution by depriving the midwife of her ability to earn a living in her chosen profession because the legislature could have believed that midwives who had completed a nursing program and were affiliated with a medical professional were more fit than direct-entry midwives to practice midwifery considering the risks. Ensuring fitness was then rationally related to the interest of protecting the health and welfare of mothers and infants. The "right to follow a chosen profession" was a property interest, thus state imposed restrictions on it must only be rationally related to a legitimate state interest (as opposed to being *narrowly* tailored to serve a *compelling* state interest as would be

the case with a fundamental right--strict scrutiny analysis.)

(2) not violate the prospective clients first amendment rights by allegedly restricting their right to choose a birthing style and a qualified attendant of their choice because (see A(1) above)

(3) did not violate the mother's right to privacy because privacy right did not encompass the right to choose a direct entry midwife to assist with childbirth, thus the matter did not touch on a fundamental right and the standard of review became rational basis (instead of strict scrutiny.) Assuring the fitness of midwives was *rationally related* to the state's *legitimate interest* in protecting the health and welfare of mothers and infants.

B. Summary judgment was proper because:

(1) the differing opinions of testifying physician and midwives at trial showed that reasonable minds could differ about the competence of direct-entry midwives. Thus the legislature could well have viewed direct entry midwives as unlikely to be competent, even if that view was wrong. This made it a matter of law for the judge rather than a issue of fact to be tried

(2) the midwife and prospective clients submitted no evidence showing that the PMPA substantially interfered with the exercise of the alleged right to give birth at home

(3) even if choosing home birth was a fundamental right, the parties presented no evidence showing an inability to find a nurse midwife to perform that service.

C. The PMPA (#3) did not interfere with the fundamental right to privacy because privacy did not encompass the right to choose a particular health care provider.

D. The standard of review when deciding whether the PMPA (#3), which regulated midwifery practice and set out the requirements for licensure, violated prospective clients' right to privacy was rational basis (related to a legitimate state interest) because it did not affect a fundamental right in that:

(1) the right to privacy did not encompass the right to choose a direct-entry midwife to assist with childbirth

(2) ensuring that midwives were competent in handling the medical risks associated with childbirth was rationally related to the states legitimate interest of protecting the health and welfare of mothers and infants.

12. LEGGETT V. TENNESSEE BD. OF NURSING TENN.APP., 612 S.W.2D 476 (1980)

Subjects: TN, Admin. nurse midwife, unauthorized practice of medicine/nursing, license revocation, jurisdiction, interpretation of statute, license requirements (beyond the scope of authority)

Statutes:

#1 T.C.A. sect 63-608
#2 T.C.A. sect 63-729 et seq.
#3 T.C.A. sect. 63-740
#4 T.C.A. sects. 63-102, 63-108, 63-740 & Rule no. 1000-1-04(3)(a)(b)
#5 T.C.A. 63-608

Facts: Board of Nursing revoked license of a registered nurse who acted as a midwife, dispensed medication to midwifery clients, did not hold herself out as a midwife, medicated clients with pitocin, had no written protocols or sponsoring physician as required of nurse midwives. She was found guilty of unprofessional conduct. (Note: direct-entry midwifery was unregulated)

A. The Board of Nursing lacked jurisdiction over a nurse while she rendered services as a direct-entry midwife because:

(1) the legislature excluded midwifery from the definition of medicine in (#1)

(2) the Nurses practice Act (#2) did not deal with midwifery or include it in the definition of professional nursing (#3)

B. The nurse did not violate the requirement concerning responsibilities of licensed nurses (#4) by practicing midwifery because:

(1) she was not performing as a nurse when she practiced midwifery

(2) she was not performing an unsupervised delegated function which she was unprepared to handle by education or experience that the requirement could prohibit

(3) the Medical Practice Act (#5) exempted midwives

(4) The Nurses Practice Act (#3) did not include midwifery in the definition of professional nursing

(5) midwives were specifically exempted from licensing by the Board of Healing Arts (#5); so the nursing regulation did not apply to performing midwifery.

C. The rule regulating nurses who performed in expanded roles (#4) did not apply to the nurse practicing midwifery because:

(1) the nurse did not represent herself as a "nurse midwife"

(2) she did not perform as a nurse in her role as a midwife

(3) her services as a midwife were independent of nursing and did not adversely affect her nursing skill.

D. The Nursing Board lacked jurisdiction to discipline a nurse for dispensing medication not available without prescription while practicing midwifery because

(1) the act was outside the profession of nursing

(2) the conduct did not affect the quality of nursing services by a nurse when acting as a nurse. Thus the nurse should be tried as a lay person.

13. LEIGH V. BOARD OF REGISTRATION IN NURSING, 506 N.E.2D 91 (MASS. 1987)

Subjects: MA, Admin. registered nurse, unauthorized practice of midwifery, constitutionality of statute (equal protection, due process, practice profession), standing, unprofessional conduct

Statutes:

(#1) 244 Code Mass. Regs. Sect 4.00 et seq. (1980)

(The statute required a nurse midwife to have a special license and to practice in a licensed facility as part of a health care team. No regulations governed direct-entry midwives specifically.)

Facts: The Board of Registration in Nursing suspended the license of a nurse midwife who attended at uncomplicated home births, used obstetrical instrument to measure fetal heartbeat, and charged fees. The midwife sought review in the Supreme Judicial Court. The judge remanded the case to the Board. The Board sustained the suspension, finding unauthorized practice of midwifery. The midwife argued that she did not commit gross misconduct, but performed "lay midwifery," which was outside the practice of nursing or medicine.

A. The court's decision did not violate the midwife's right to practice her profession because the legislature's apparent conclusion that nurses needed training beyond regular nurse training to practice midwifery was rational.

B(i). The statute (#1) was not an unconstitutional extension by implication of a criminal statute because the statute showed no intention to regulate the practice of midwifery by anyone other than nurses, or to grant the Board jurisdiction over the practice of midwifery by anyone except nurses.

B. The Statute did not violate the midwife's right to equal protection (by claiming that the classification prohibited nurses and nurse midwives but not lay midwives) because:

(1) the statute rationally furthered the legitimate state interest in having births attended by non-physicians take place in licensed facilities and assisted by certified nurse midwives. Thus, it was at least debatable, hence rational, to believe that hospital and birth center deliveries were safer than home births

(2) the equal protection clause did not require that the government attack every aspect of a problem at once, and thus the statute did not need to regulate direct-entry midwives to be constitutional

(3) the public's expectation that nurse midwives would be more highly trained than direct-entry midwives was a justified distinction between direct-entry and nurse midwives

(4) assuring minimal training and competence for licensed nurses so consumers could rely on that certification in making choices about health care was a legitimate purpose, and the statutory scheme regulating nurses who practiced as midwives rationally furthered that purpose.

C. The statute did not violate the pregnant mother's privacy right because:

(1) after a fetus is viable, the State's legitimate interest in protecting the health and safety of the mother and child superseded the mother's right to choose, and the statute spoke to the safety of the child and mother

(2) The statute did not require mothers to give birth in hospitals or to obtain medical treatment, only that nurses practicing in the expanded role of midwife be licensed and practice in a licensed facility, none of which were the fundamental rights established in Roe v. Wade and later cases

(3) The statute was not an irrational way to further the legitimate interests of the health and safety of the mother and child because, even if home births were safer than hospital births, the statute was a reasonable approach to establishing the safest conditions for all births attended by nurses. The argument that home deliveries were as safe as hospital births would be more properly directed to the legislature.

D. The midwife could assert the due process rights of her clients because:

(1) as a nurse midwife she had *incentive* to asses the rights of her clients

(2) the ruling would affect her client's ability to choose their manner and place of giving birth.

14. MCTIGUE, STATE DEPT. OF HEALTH, ETC. V., 387 SO.2D 454 (FLA.APP.1980)

Subjects: FL, Admin. midwife (candidate), exercise of delegated legislative authority, physician recommendation, licensing requirements

Statutes:

#1: Section 485.031(4)(b), Florida Statutes (1977)
#2: Rule 10D-36.21, Florida Administrative Code
#3: Id. .22(a)(1)2

Facts: The licensing statute (#1) required a midwife candidate to have a written statement from a physician establishing the midwife's competency, and to list the dates of service and addresses of her previous patients. The Department later enacted a rule (#2) requiring the recommending physician be licensed in Florida, and a rule requiring the candidate furnish her previous patients' *names* (#3). A midwife candidate's application for license was denied because her physician was from New York, where the midwife had been trained. The midwife appealed to the Division of Administrative Services, which held that the new rule requiring a direct-entry midwife candidate to have a statement from a Florida physician was an invalid exercise of delegated legislative authority, but that the rule requiring an applicant to furnish the names of previous patients was a valid exercise of delegated legislative authority. Both the midwife and the Department of Rehabilitative Services appealed the respective rulings.

A. The rule requiring that the recommending physician be from Florida was an invalid exercise of delegated legislative authority because:

(1) adding the location requirement added a criterion the legislature had not intended to include

(2) the ordinary meaning of "physician" did not distinguish by locale

(3) the context of the statute did not require otherwise

B. The rule requiring nurse midwife applicants to list previous patients' names and addresses, was also an invalid exercise of delegated legislative authority because:

(1) the same reasoning as in "A" (above)

(2) the department was not authorized to modify provisions that spelled out with particularity the licensing criteria

(3) the name and address of patients may not be known to applicants trained in formal educational facilities, thus it may discriminate toward "formally trained" candidates relative to "informally trained" candidates.

14.5 MILLER, OHIO V., 03-LW-0707 (5TH)

Subjects: OH; Crim/Civil, contempt of court--civil; waiver of appellate review, double jeopardy, judge impartiality; unauthorized practice of medicine

Statutes:

#1: O.R.C. 4731.41 (attempted unauthorized practice of medicine)
#2: O.R.C. 4729.51 (possessing dangerous drugs)
#3: Const. Amend. V (right against self-incrimination)
#4: O.R.C. 2705.06 (imprisonment for contempt)

Facts: Per a plea agreement, a midwife pled guilty to attempted unauthorized practice of medicine (#1) and dangerous drug possession (#2). Per the plea agreement, the prosecutor subpoenaed the midwife to testify before the grand jury about the source of certain drugs she had possessed. The midwife asserted her right against self-incrimination (#3). The state filed a motion to compel the midwife to testify and to grant the midwife immunity, which the trial court granted. Before the grand jury again, the midwife evaded or refused to answer key questions about where she got the drugs. Not until the next day did the trial court issue a judgment entry granting the state's motion to compel and request for immunity. The trial court then conducted a show cause hearing on the contempt motion in which the midwife pled no contest. The trial court found the midwife in "indirect civil contempt" and ordered her jailed until she testified or the grand jury term expired. The midwife appealed, arguing that (a) the prosecutor's use of the grand jury was really a harassment or punitive tactic and that she did not formally have immunity when the second grand jury proceeding commenced because the immunity grant had not been journalized in a judgment entry, (b) that the contempt finding opposed the weight of the evidence, (c) that the jail sentence was a later punishment for her earlier dangerous drug possession and thus was double jeopardy, that she was not afforded due process in the contempt proceedings, and that (d) the trial court's sanction of a jail sentence instead of a fine indicated a bias against midwifery and midwives.

A. The midwife waived her right to review whether the prosecutor's use of the grand jury

proceeding was punishment or harassment, or whether she had been formally granted immunity at the time of the hearing, or whether her due process had been violated because:

(1) the midwife did not make a motion to dismiss before the show cause hearing commenced

(2) the midwife never challenged the court's prior order to compel the midwife to testify

(3) the midwife made no due process challenge before the hearing

B. The contempt finding did not oppose the weight of the evidence because one cannot raise a manifest weight claim after a plea of no contest, but only after making a not guilty plea and after all the evidence has been presented.

C. The jail sentence was not double jeopardy because the contempt finding was civil, not criminal, contempt.

D. The jail sentence did not indicate bias by the trial court because:

(1) no evidence of abuse of discretion or a demonstrable lack of impartiality existed

(2) without a court having civil contempt power, any witness could obstruct the administration of justice.

15. MILTON V. DEPT. OF HEALTH AND REHAB. SERV. 579 SO.2D 337 (FLA.APP. 1 DIST. 1991)

Subjects: FL, Admin. nurse midwife, license revocation, evidence, unprofessional conduct.

Statutes:

#1: Rule 10D-36-0.46(4)(o) Florida Administrative Code,
#2: *Id*. (g)
#3:*Id*. -041 and 042.

Facts: An administrative complaint alleged that the nurse midwife violated the licensing rules by (1) not referring a patient to a physician when the child sustained a laceration during birth, and when palpitation should have indicated that the child weighed more than 4000 gr, and (2) by accepting the mother as a patient without securing an exam by a physician and making a risk assessment. The hearing officer ruled that clear and convincing evidence was shown and suspended the midwife's license. The midwife appealed, arguing of lack of substantial evidence.

A. Substantial evidence did not support the hearing officer's finding because the Department's expert testimony about how to estimate fetal size by comparing fundal height with gestation time and measuring the mother's weight gain, but not how to estimate the baby's weight to be over 4000 gr during labor by a palpitation method, or the accuracy of palpitation methods generally, was not competent proof to support the allegation that the licensed midwife had violated the rules requiring her to assess the infant's weight during labor to determine whether referral to a physician was proper. Because the testimony did not speak about what actions to take *during* labor, the midwife should not have had her license revoked.

15.5 MOUNTJOY, STATE V., 891 P.2D 376 (KAN. 1995)

Subjects: KS, Crim. direct-entry midwife, unauthorized practice of medicine, jury instructions, standard of review, interpretation of statute (criminal)

Statutes:

#1: K.S.A. 65-2800 et seq., Kansas Healing Arts Act

(One needed a license to practicing the healing arts, which included "any system, treatment, operation, diagnosis, prescription, or practice for the ascertainment, cure, relief, palliation, adjustment, or correction of any human disease, ailment, deformity, or injury...")

Facts: Three direct-entry midwives attended a home birth where the baby was stillborn. The

state charged the midwives with practicing the healing arts without a license. The trial court found the midwives not guilty. The State reserved the following questions for appeal: whether the trial court wrongly instructed the jury that the prosecution had to show that the midwives acted with criminal *intent* and were not responding to an emergency, and to consider whether the midwives believed their conduct constituted an offense.

A. The Supreme Court lacked authority to answer the question of whether direct-entry midwifery was illegal and whether the trial court properly instructed the jury because:

(1) questions reserved by the state will not be considered on appeal simply to determine whether the trial court erred in its ruling that was adverse to the State

(2) those questions were not of such interest that the answers were necessary to administer justice correctly and uniformly statewide.

B. The prosecution did not need to show that the midwives acted with criminal intent because:

(1) the statute aimed to protect public welfare, thus requiring broad interpretation to achieve its purposes, and the statute did not state that criminal intent was required

(2) the common law rule requiring criminal intent to convict one of a crime did not apply to public welfare offenses.

16. NORTHRUP V. SUPERIOR COURT, 237 CAL.RPTR. 255 (CAL.APP. 1987).

Subjects: CA, Crim. direct-entry midwife, unauthorized practice of medicine, manslaughter, exemptions (religious), constitutionality of statute, extraordinary relief (writ of prohibition), midwifery defined, selection of remedy.

Statutes:

#1: Bus. and Prof. Code, div. 2, ch. 5, Medical Practice Act (the Act) (sect 2000 et seq.)

(The Act required a certificate to practice midwifery, authorizing midwives to attend cases of "normal childbirth." The Act also did not "regulate, prohibit, or apply to any kind of treatment by prayer, nor interfere in any way with the practice of religion.")

Facts: Two direct-entry midwives belonged to the Church of the First Born, which prohibited using doctors or nurses. Members relied on the power of God to assist the ill. The midwives used "helpers" to assist at childbirth by praying, making the mother comfortable, stretching the vaginal opening for delivery, cutting the umbilical cord, feeling the abdomen to determine the

baby's position, guiding the baby at delivery, and trying to revive a child who was stillborn. The State charged the midwives with unauthorized practice of medicine. The midwives made a motion to set aside the charges. When the trial court denied it, the midwives sought a writ of prohibition from the appellate court. The helpers claimed their conduct was not midwifery because they did not advertise or charge for services, their service was mostly through prayer, and that they were immune by the religious practice exemption of the Medical Practice Act (#1). The midwives also asserted that the certification requirements interfered with their practice of religion by forcing helpers to seek medical assistance in certain situations.

A. The midwives' conduct was midwifery because midwifery was the "furthering or undertaking by any person to assist a woman in normal childbirth" and the midwives' conduct encompassed far more than just prayer.

B. The midwives were exempt from the Medical practice Act (#1) because:

(1) the obligations of a certified midwife to refer cases to physicians under abnormal circumstances conflicted with the helpers religious practices, which forbade using doctors

(2) the religion was not pre-textual or a subterfuge designed to circumvent licensing statutes

(3) the statute's language was plain and clear

(4) The only protection afforded by the religious practice exemption was from prosecution for not having a midwifery license. The exemption statute in the Act (#1) spoke only to midwife licensing requirements, and the lack of a license alone would not support prosecution for death to another. It would not preclude prosecution for second degree murder if there was a conscious disregard for life. The midwives here could be prosecuted under other statutes if found applicable, for example, manslaughter.

17. PAVEK V. STATE, 737 S.W.2D 136 (TEX.APP.--AMARILLO 1987)

Subjects: TX, Crim. direct-entry midwife, extraordinary relief (habeus corpus), constitutionality of statute (vague), unauthorized practice of medicine

Statutes:

#1: Tex.Rev.Civ.Stat.Ann. Art. 4512i 17(3)& 18(a-b)(Vernon Supp.1987)

Facts: A direct-entry midwife was charged with violating the statute regulating direct-entry midwives (#1) and indicted for "knowingly and intentionally removing the placenta from the mother by invasive techniques." The midwife pled *nolo contendre* and assessed a fine. She applied for a writ of habeas corpus seeking release from the charge, alleging the statute was unconstitutionally vague. Denied. The midwife appealed, arguing that the wording "invasive techniques" and "remove" was vague.

A. The statute (#1), which prohibited a lay midwife from "removing the placenta by invasive techniques," was not vague concerning "remove" and "invasive techniques" because "remove" was used in its commonly accepted sense, and "invasive techniques" was used in its normal medical sense, which was "moving the placenta from its position or taking it from the body, by any procedure involving an entry into the body." Thus the midwives were fully aware of the prohibition. The statute was also clear enough to give ordinary persons notice of what acts were prohibited.

18. PECKMAN V. THOMPSON, 745 F. SUPP. 1388 (C.D. ILL. 1990)

Subjects: FED/ILL, Civil. direct-entry midwife, constitutionality of stat (vague), standing

Statutes:

#1: 42 U.S.C. sec. 1983 (Civil Action for Deprivation of Rights)
#2: Ill. Rev. Stat. ch.111, para. 4400-1-4400-63 (1989) (Illinois Medical Practice Act)

(The statute prohibited the "practice of medicine in all its branches" and diagnosing or treating "human ailments, or supposed ailments" without a valid medical license.)

Facts: A direct-entry midwife and her apprentice were indicted for practicing medicine without a license under the Illinois Medical Practice Act (#2). Before the trial, the midwife, her apprentice, and a couple who wanted to utilize the midwife brought an action under the federal civil rights statute (#1) seeking an order requiring Illinois to recognize "traditional" midwifery and a judgment declaring the Medical Practice Act unconstitutionally vague.

A. The midwives had standing to bring an action under the civil rights statute asking the court to force Illinois to recognize traditional midwifery and to declare the Illinois Medical Practice Act of 1987 unconstitutional because, in contrast to Bowland v. State, the midwives were indicted under the act, thus raising a "substantial controversy."

B. The Illinois Medical Practice Act of 1987 was unconstitutionally vague because, though Illinois acted within its constitutional police power limits in amending the act, it did not define the phrases "practice of medicine in all its branches" and "ailments, or supposed ailments," the common understanding of which generally did not encompass "assisting the normal delivery of a healthy child." Because the act did not mention midwifery or clarify to what extent midwifery was regulated, plaintiffs could have concluded that the act did not forbid their conduct.

C. Illinois did not need to recognize "traditional" midwifery because the constitution neither prohibited Illinois from exercising its police power toward midwives nor demanded that midwifery be licensed or recognized in Illinois.

19. PETTY-EIFERT, DEPARTMENT OF HEALTH V., 443 SO.2D 266 (FLA.APP. 1 DIST. 1983)

Subjects: FL, Admin. nurse midwife (candidates), waiver of review, exercise of delegated legislative authority.

Statutes:

#1: Chapter 485, Florida Statutes (1981).
#2: Chapter 467, Florida Statutes (Supp. 1982)
#3: Rule 10D-36.-22(1)(a), Fla. Administrative Code
#4 Rule 10D-36.22(1)(d), Fla. Administrative Code
#5: Rule 10D-36.27, Fla. Administrative Code

Facts: Florida required a license to practice midwifery (#1). Two midwife candidates applied to the Department of Health and Rehabilitative Services (HRS) for licenses. One month later, before the midwives' applications were decided on, the State passed a new statute. Under that new statute, HRS made rules requiring applicants to have assisted fifteen deliveries within a year's time (#3) and obtain a favorable recommendation from the county medical director (#4). The midwives did not meet those new qualifications. HRS denied one midwife's application because she had not received a favorable recommendation from the county medical examiner and did not satisfactorily complete birth certificate forms. HRS denied the other midwife's application because she had not attended fifteen cases of labor in one year in that two cases did not occur in a hospital. The midwives petitioned the Department of Administrative Hearings,

arguing that the new statute (#2) and its rules (#3-5) should not apply to them because they became effective after the date of the applications, and that the new rules (#3-5) were invalid exercises of delegated legislative authority. The hearing officer ruled that the midwives should have the former statute (#1) applied to them and that the rules promulgated under the new statute (#3-5) were invalid exercises of delegated legislative authority. The Department of Administrative Hearings appealed, arguing that the new rules were valid.

A. The midwives were entitled to have the previous statute (#1) applied to their case.

B. The new licensing rule requiring applicants to have attended fifteen deliveries in one year (#3) and excluding births attended outside a hospital was an invalid exercise of delegated legislative authority because:

(1) the in-hospital requirement added a criterion which was not in the statute, thus there was no statutory basis for it in the rule

(2) the rule did not state when the one year period must have occurred, one or thirty years ago, and did not require that the labors be attended while the patient was in the hospital, thus the Department wrongly disregarded two of the midwife's cases of childbirth.

C. The rule requiring midwife applicants to secure a favorable recommendation from the county medical director (#4) and the requirement that candidates fill out birth certificate forms accurately was invalid because there was no such requirement in the statute, thus there was no statutory basis for them in the rule. Specifically, the former statute required only that one fill out birth certificate forms "legibly."

D. The Department of Health waived the right to contest the validity of a hearing officer's finding that the licensing rule concerning administering oxygen (#5) was an invalid exercise of delegated legislative authority because the Department did not argue that issue on appeal.

21. ROSBURG, PEOPLE V., 805 P.2D 432 (COLO.1991)

Subjects: CO, Admin/Crim. direct-entry midwife, extraordinary relief, (injunction), constitutionality of statute (privacy, vagueness, equal protection), unauthorized practice of midwifery/medicine, standing

Statutes:

#1: West's C.R.S.A. sec. 12-36-106(1)(f); 106(2), 5 C.R.S. (1985)

(Practicing midwifery without a nurse midwife license constituted the practice of medicine.)

Facts: The court permanently enjoined direct-entry midwives from practicing because Colorado required a license. The trial court also ruled that the midwives lacked standing to raise the privacy rights of mothers. The midwives appealed, arguing that the statute violated mothers' right to privacy and the statute was unconstitutionally vague by not defining midwifery.

A. The midwives had standing to assert the privacy right of pregnant women because, as vendors of midwifery services,

(1) the midwives stood in a sufficiently adverse position to present issues effectively

(2) the statutes (#1) subjected the midwives to direct injury

(3) to deny standing would encourage a fortuitous pattern of results and obscure the scope of the constitutional right to privacy

(4) because the statute imposed a duty on the midwife and not on the mother, it was improbable that mothers would assert the alleged privacy deprivation.

B. The statute requiring midwives to have a license to practice (#1) did not violate pregnant women's right to privacy because:

(1) privacy pertains only to personal decisions about marriage, procreation, contraception, family relationships, child rearing, and education, not necessarily childbirth

(2) per Roe v. Wade, the interests of a viable fetus superseded the woman's right to privacy.

C. The midwives did not have their constitutional right to equal protection violated by the statute, by requiring a nurses license to practice midwifery because prohibiting direct-entry midwifery bore a rational relationship to the state's legal interest in protecting the health of the mother and child.

D. The midwives did not have their constitutional right to due process violated due to vagueness because "midwifery" was a common term, and people of common intelligence did not need to guess at its meaning.

E. The standard of review for the equal protection challenge was "rational basis" because the case did not touch upon a fundamental right or involve a suspect class.

22. RUEBKE, STATE BOARD OF NURSING V., 913 P.2D 142 (KAN)

Subjects: KS, Admin. direct-entry midwife, unauthorized practice of medicine/nursing, extraordinary relief, exemptions, standard of review, behaviors incident, constitutionality of statute (vague).

Statutes:

#1: K.S.A. 65-2801 et. seq. (healing arts act)
#2: K.S.A. 65-1113 et. seq. (nursing act)

(The Healing Arts Act defined healing arts as the "ascertainment, relief, palliation, adjustment or correction of any human disease, ailment, deformity or injury" and persons who publicly professed to assume the duties "incident to the practice of medicine," prescribe or furnish drugs or use surgical instruments to relieve, cure, or diagnose wounds and fractures, etc.

The Nursing act defined nursing as "the process in which substantial specialized knowledge derived from the biological, physical, and behavioral sciences is applied to the care, diagnosis, treatment, counsel and health teaching of persons who are experience changes in the normal health processes...")

Facts: A direct-entry midwife assisted pregnant women with pre-natal, delivery, and post-partum care; worked with supervising physicians who were available for consultation and incident medical testing; did not advertise or charge for her services, and held herself out only as midwife. The State Board of Healing Arts and The State Board of Nursing sought to enjoin the midwife from continuing her alleged practice of medicine. The midwife argued that the Healing Arts Act (#1) was unconstitutionally vague. The trial court ruled that certain provisions of both Acts were unconstitutionally vague and that the midwife's practices were outside the scope of the Acts. Specifically, the midwife had held herself out as being no more than a midwife, consulted with supervising physicians, did not administer prescription drugs, did not do suturing or episiotomies, make cervical or vaginal lacerations, or diagnose blood types, and had engaged in activities routinely and properly done by non-physicians.

A. (omitted)

B. The statute provision of the Healing Arts Act defining healing arts (#1) was not unconstitutionally vague because:

(1) the statute's language "disease, ailment, deformity, or injury" had a meaning so ordinary, definite, and understandable that people of common intelligence would easily understand what was prohibited.

However, the definitions did not cover midwifery because:

(2) the provisions "diseases" "ailments" and "deformities" focused exclusively on pathologies and abnormal human conditions, which neither pregnancy nor childbirth were

(3) its term "practice of medicine and surgery" had an established legal meaning in Kansas, "*the science and art of dealing with the prevention, cure, and alleviation of a disease*, which aiding in childbirth was not

(4) despite the inclusion of obstetrics in "practice of medicine" and though midwifery may have fit within a technical definition of practice of medicine or surgery, it was an historically separate practice under the Healing Arts Act (#1).

C. The midwife did not engage in the practice of medicine because:

(1) her activities were not incident to the practice of medicine because they did not naturally and inseparably depend upon, appertain to, or follow the practice of medicine, but simply were activities common to both types of practitioners

(2) even if those or other activities fell under the language of the Healing Arts Act (#1) the midwife was exempt from the act because she worked with physicians who were familiar with her practices and who authorized her actions.

D. The Nursing Act (#2) was not vague because, like the Healing Arts Act, it did not encompass "midwifery," in its language, and the midwife did not claim specialized scientific knowledge, and her assistance was not valued as the application of a firm and rarified grasp of scientific theory, but only as practical experience in assisting in childbirth. Also, pregnancy and childbirth were not "changes in normal health processes," but *continuations* of normal health processes. Direct-entry midwifery and nursing were separate and distinct, and though the legislature could have placed midwifery under the authority of the State Board, it had not done so.

E. Direct-entry midwifery was not the practice of nursing under the Nursing Act such that

licensing was required because, though midwifery might fit some technical definition of nursing, midwifery was historically separate and unique from nursing.

24. SAMMON V. BOARD OF MEDICAL EXAMINERS, 66 F.3D 639

Subjects: FED/NJ, Civil direct-entry midwife, standing, constitutionality of statute (due process), extraordinary relief (injunction), disposition without trial (dismissal), standard of review

Statutes:

#1: 42 U.S.C. sec. 1983 (Civil Action for Deprivation of Rights)
#2: Const. Amend. XIV (due process clause)

(New Jersey required a license to practice midwifery. To get a license, midwifery candidates needed to have a physician endorsement, pass a special exam, show they were of good moral character, graduate from a legally incorporated school of midwifery or maternity hospital, and have at least 1,800 hours of instruction over nine months.)

Facts: Several direct-entry midwives and non-expectant couples brought suit under the federal Civil Rights Act (#1) against the Governor of New Jersey and the New Jersey Board of Medical Examiners, claiming the licensing scheme violated their right to due process (#2). The midwives asked the court to enjoin New Jersey from enforcing the statute. The Board of Examiners made a motion to dismiss, arguing that the midwives and prospective clients lacked standing to bring the case. The trial court granted the dismissal because the midwives were only aspiring to become licensed, and they had neither approached physicians and been denied sponsorship nor applied for a license. The midwives and prospective clients appealed.

(Rule: To establish standing (legally accepted reason) to bring suit, plaintiffs must have suffered an invasion of a legally protected interest which is concrete and particularized, actual or imminent, with a causal connection between the injury and the conduct complained of, and likelihood that a favorable decision will redress the injury. Lujan v. Defenders of Wildlife (1992), 504 U.S. 490, 560-61.)

A. The midwives had standing to bring an action under 42 U.S.C. 1983 because:

(1) their alleged injury--the inability to practice midwifery--was traceable to the statutory scheme and likely would be redressed by the statute being ruled unconstitutional, which fulfilled the causal connection and likely redress elements of standing

(2) the midwives assertion of the right to practice their profession was legally cognizable because the difficulty in practicing their profession affected each midwife personally and individually,

making the difficulty concrete and particularized

(3) even though the midwives may have lacked necessary training, their injuries were actual because the midwives presented sincere desires to work as midwives, thus their claim that the statutory scheme had deterred them from reaching that goal was not based on uncertain events

(4) even though the midwives had never applied for midwife licenses, the midwives could not obtain licenses without 1800 hours of instruction, making application a futile gesture. Litigants were not required to make futile gestures to establish ripeness for adjudication.

B. The parents had standing bring the action because, though, none of the women were pregnant, they had born children before, intended to have more children, were determined to employ midwives to assist them in home births, and had employed midwives before, making their claims "ripe for adjudication."

C. The interests of midwives to practice, and of parents to select that practice, was not a fundamental right. So the standard of review was rational basis, requiring only a showing of a legitimate state interest.

D. The midwifery licensing statute did not violate due process because the licensing requirements were rational given New Jersey's interest in ensuring competence of the entire midwife population, ensuring the health of all potential consumers, and the belief that such training would better achieve this. It perhaps was rational to believe that endorsing physicians would be biased in evaluating midwife candidates, which would overburden candidates, but it was also rational for the legislature to have found value in the views of physicians who had worked with the midwives before issuing a license, and for believing that a sufficient number of doctors would participate honestly. Changing the statute was a matter for the legislature.

24.5 SHERMAN, PEOPLE EX. REL. V. CRYNS, 763 N.E.2D 904 (ILL.APP.2 DIST.2002)

Subjects: IL, Crim/Admin. direct-entry midwife, 5th amendment (self-incrimination), unauthorized practice of nursing/midwifery, admission of evidence (videotape of birth), extraordinary relief (injunction), directed verdict, selection of remedy.

Statutes:

#1: Nursing and Advanced Practice Nursing Act 225 ILCS 65/20-75(a) & 65/5-10(l) (West 1998)
#2: U.S. Const. amend. V

Facts: The state of Illinois sought to enjoin a direct-entry midwife from practicing nursing and

midwifery until she obtained a proper license under the Advanced Nursing Act (#1.) The midwife already had a cease and desist order issued against her. She allegedly assisted in a birth for which she was paid. At trial, the Illinois Department of Professional Regulation called the midwife to testify about her activities at the birth and about her license status. The midwife asserted the fifth amendment (#2) by refusing to testify and by attempting to exclude from evidence a videotape of the birth. The videotape and evidence revealed that the midwife had, among other things, checked the mother's cervix to determine dilation, checked the baby's heartbeat in utero, stretched the vaginal opening, and twisted the baby's torso to manipulate the baby through the opening. The trial court directed a finding in favor of the midwife. The Director of Professional Regulation, Sherman, appealed. The appellate court held that:

A. The court did not abuse its discretion in admitting the videotape because:

(1) The maker of the videotape did not need to testify to establish a foundation for that evidence. The court needed testimony only from a witness with personal knowledge who could testify that the tape truly and accurately depicted the events. The decision to admit the videotape was within the court's discretion

(2) The husband, who had not made the tape, but was present at the birth, was competent to identify the videotape as portraying the labor and the birth of the child

(3) The date and time of the birth, and the midwife's presence at, and assistance with, the birth, were clearly portrayed on the tape.

B. The trial court's directed finding for the midwife was improper because the state made a prima facie case for practicing nursing or midwifery without a license through the testimony of the husband and through the videotape, which revealed who was present at the birth.

C. The midwife's actions were the practice of nursing because:

(1) checking the mother's cervix to determine if the mother was fully dilated and checking the baby's heartbeat in utero was assessing the mother's and the baby's "health needs" and making "nursing evaluations"

(2) stretching the vaginal opening and twisting the baby's torso to manipulate the baby through the opening was more than "assisting" at the birth; it was participating in the actual delivery

(3) The statute (#1) gave more than adequate notice of what acts constituted unauthorized nursing.

D. The trial court correctly ruled that it could draw no negative inferences from the midwife's

refusal to testify about her activities because the midwife had a criminal case pending against her and the testimony could be used against her in that criminal case.

25. SMITH V. STATE EX REL. MEDICAL LICENSING BOARD, 459 N.E.2D 401 (IND.APP.2 DIST. 1984)

Subjects: IN, Crim/Admin direct-entry midwife, unauthorized practice of medicine/midwifery, extraordinary relief (injunction), disposition without trial (summary judgment), waiver of appellate review, jurisdiction, interpretation of statute, selection of remedy.

Statutes:

#1: Indiana Code sect. 25-22.5 et seq. (1982) (Medical Practice Act)
#2: Indiana Code sect. 25-22.5-5-5 (1982) (Limited license statute)

(The Medical Practice Act defined the practice of medicine as "holding oneself out to the public as being engaged in the diagnosis, treatment, correction or prevention of any disease...or other condition of human beings...or the administration of any kind of treatment...")

(The limited license statute gave midwives, upon successful application, a limited license to practice medicine to practice only midwifery in Indiana. The midwife must have met all the registration requirements required for applicants for a physician's license.)

Facts: A direct-entry midwife admitted she had assisted pregnant women by conducting manual inner vaginal examinations, pelvic measurements, exams for fluid retention, cervical examinations and dilations, monitoring of fetal heartbeats, uterine measurements, blood and urine exams, assisted women in childbirth, prescribed vitamins, and advised pregnant women about diets, and did not have a license to practice midwifery. The State sought to enjoin the midwife permanently from practicing medicine and midwifery. The parties filed cross motions for summary judgment. The State argued that the midwife had engaged in the unauthorized practice of midwifery and medicine as a matter of law. The midwife argued that the court lacked subject matter jurisdiction because such an action could not be brought by the Attorney General. The trial court granted the State's summary judgment, concluding that the practice of midwifery was the practice of medicine as a matter of law and enjoined the midwife from practicing medicine and midwifery. The trial court permanently enjoined the midwife from "engaging in...all acts constituting the practice of medicine or midwifery," and then listed the acts the midwife could not do. The midwife appealed, arguing that midwifery was not the practice of medicine under the statute and thus the State could not enjoin midwifery practice. The midwife also argued that the limited license statute (#2) was unconstitutional and that the trial court's findings were fatally defective by not stating that the midwife's conduct was practicing medicine.

A. The trial court could decide a case brought by the Attorney General about enjoining a direct-entry midwife for practicing medicine because the State Attorney General brought the action on the relation of the Medical Licensing Board under the statute (#1), which allowed an attorney general to maintain an action for the state to enjoin a person from engaging in the unauthorized practice of medicine.

B. The midwife committed unauthorized practice of medicine because pregnancy was included in the term "condition" and the midwife had treated the pregnancy.

C. Midwifery was the practice of medicine by law because:

(1) the plain and ordinary meaning of midwife was a "woman who assists at childbirth", where childbirth was the "termination of the condition known as pregnancy", and because treating it was the practice of medicine, the statute (#2) set out the limited license requirement in clear distinction to the physicians unlimited license

(2) reading the former statute any other way would render the "limited license" language in the former statute ineffectual, which obviously the legislature did not intend

(3) midwives were also included under the "Physicians" section in the Code.

D. A midwife was a "woman who assists at childbirth."

E. The midwife could be permanently enjoined from practicing medicine, without trial, because her admissions that she had engaged in the extensive care and actual deliveries of babies, and that she had no license to practice midwifery or medicine, was how the law defined the unauthorized practice of medicine.

F. Although the trial court's findings did not state that any of the midwife's actions were the practice of medicine, the findings were not defective because they stated that the midwife was enjoined from practicing medicine, then listed the specific acts she was prohibited from doing.

G. The midwife waived her argument about the constitutionality of the limited license statute (#2) because she did not raise that claim in her motion to correct errors.

26. SOUTHWORTH; STATE EX REL. MISSOURI STATE BOARD OF REGISTRATION FOR THE HEALING ARTS V., 704 S.W.2d 219 (MO.BANC 1986)

Subjects: MO, Admin. direct-entry midwife, unauthorized practice of medicine/midwifery, extraordinary relief (injunction), constitutionality of statute (vagueness), waiver of review,

selection of remedy.

Statutes:

#1: V.AMS 334.010, RSMo 1978 (Medical Practice Act)
#2: MO Const.art. V, & 3.; Id. I, &10
#3: U.S. Const amend. XIV

(The Medical Practice Act made it unlawful for non-physicians to "profess to cure and attempt to treat the sick and others afflicted with bodily or mental infirmities, or engage in the practice of midwifery.")

Facts: A direct-entry midwife assisted women in childbirth at home, belonged to the Missouri Midwife Association, listed midwifery as her occupation on her tax return, and signed her name, with a registration number, to birth certificates as a midwife. Her activities included internal and external examinations of the vagina, blood pressure examinations, examinations for fluid retention and of urine specimens, pelvic measurements, monitoring fetal heartbeats, suturing lacerations, and advising about diet. The midwife regularly charged four hundred dollars. The midwife did not have an office, phone listing as midwife, did not advertise, and recommended clients see a doctor during the pre-natal period. During the midwife's practice in Missouri, only two women experienced serious complications, and in both cases, the midwife helped them to the hospital. The Board of Regulation for the Healing Arts sought to enjoin the midwife permanently from practicing medicine or midwifery. The trial court ordered the injunction, enjoining the midwife from the activities she had engaged in. The midwife appealed, arguing that the Medical Practice Act (#1) was unconstitutionally vague by not defining medicine or midwifery, that she had not engaged in midwifery as a profession, that no evidence to the harm or public had existed, and that the injunction exceeded the scope of the statute. In her constitutional argument, the midwife stressed the need for statutes to define terms when the fundamental rights to privacy, marriage, procreation, childbirth, and family relations were affected.

A. The midwife waived appellate review of whether the Medical Practice Act (#1) violated her constitutional rights regarding privacy, procreation, childbirth, and family relations because she did not raise those contentions in the "Points Relied On" section of her appellate brief.

B. The Medical Practice Act (#1) was not vague because "practice of medicine" and "engaged in the practice of midwifery" were common terms and understood to include publicly representing oneself as trained in treating and caring for ills of the human body and charging a fee to diagnose ills and effectuate a cure or alleviation. Because "midwifery" meant "assisting a woman in childbirth, and "practice" meant "the exercise of a profession or occupation" in traditional and legal dictionaries, the phrases supplied meaning to the statute and guidance to those applying it.

C. The midwife practiced midwifery as a profession because the plain language of the Act (#1) was triggered when one engaged in "the practice of midwifery", which included people pursing it as an occupation.

D. Even though the midwife did not have an office for, did not advertise about, and did not earn living habitually from, midwifery, her other acts of holding herself out as a midwife, accepting payment, and listing midwifery as her occupation on her tax return showed that she had engaged in the act of assisting a woman in childbirth as an occupation, thus had committed unauthorized practice of midwifery.

E. Enjoining the midwife from practicing midwifery was proper because:

(1) the midwife's practice of midwifery and medicine without license met the Board's burden of showing the acts were performed, or offered to be performed, without proper authority or license

(2) the burden did not include showing harm to an individual.

F. The injunction enjoining the midwife from practicing midwifery or medicine, while appropriate per se, was excessive in enumerating the numerous specific acts because the acts would not be prohibited in every instance. But those acts would be barred if conducted while engaging in the practice of medicine or midwifery.

27. ZIMMERMAN, PEOPLE V., 63 N.E.2D 850 (ILL.1945)

Subjects: IL, Crim. direct-entry midwife, unauthorized practice of medicine, constitutionality of statute (overbreadth)

Statutes:

#1: Ill.Rev.Stat.1943, chap 91 (Illinois Medical Practice Act)
#2: U.S. Const. Sec. 13, Art IV

(The Medical Practice Act governed the "practice of treating human ailments for the better protection of the public health.")

Facts: A direct-entry midwife was convicted of violating the Illinois Medical Practice Act (#1) for practicing midwifery. The midwife appealed on the ground that the Act violated the constitution (#2) by embracing more than one subject in that midwifery was not treating "human ailments," and because the Medical Practice Act forbade doing things that were not regulated, like administering simple home remedies.

A. The Act (#1) was not unconstitutional by dealing with a subject besides treating a "human ailment" for the better protection of the public health because unsanitary and improper methods used by those while practicing of midwifery often had serious results to the mother and child's health. The regulations were for the protection of health and were in the title of the Act, which read: "An act to revise the law in relation to the practice of the treatment of human ailments for the better protection of the public health and to prescribe penalties for the violation thereof."

B. The Act (#2) did not violate due process by forbidding things not the subject of regulation because:
(1) the midwife's behavior of holding himself out to the public as being engaged in the diagnosis or treatment of ailments of human beings, the suggesting, recommending, or prescribing treatment for relief of ailments, with the intention of receiving a fee or reward was an element of the offense, as stated in the Act (#1)

(2) while the right to pursue a lawful calling or profession could not be taken away arbitrarily, there was no arbitrary deprivation of that right where its exercise was not permitted because of a failure to comply with conditions imposed by the state to protect society.